SYARIKAT LOGISTIK PETIKEMAS SDN BHD v. MASRI HALIM & ORS AND OTHER APPEALS

HIGH COURT MALAYA, SHAH ALAM
ZALITA ZAIDAN JC
[CIVIL APPEALS NO: BA-16-23-06-2016, BA-16-24-06-2016 & BA-16-26-06-2016]
20 AUGUST 2018

LABOUR LAW: *Wages – Minimum wages – Claim for – Whether employees entitled to unpaid minimum wages – Whether mandatory to provide minimum wages – Whether basic wages differ from commission and allowance – Whether employees agreed to change of basic wages to allowance – Whether employer unilaterally made decision without consensus of employees – Whether employment terms in compliance with Minimum Wages Order 2012 – National Wages Consultative Council Act 2011, ss. 2, 23(1) & 24(2) – Minimum Wages Order 2012, O. 4 & O. 6*

The plaintiffs, employees of the defendant as lorry drivers, claimed that they were not being paid the minimum wages of RM900 for a certain period. There were two categories of plaintiffs who lodged complaints against the defendant that was, the plaintiffs who were employed before 1 January 2013, which was prior to the commencement of the Minimum Wages Order 2012 ('Order 2012') ('the first category') for the minimum wage from January 2013 to October 2014 and the plaintiffs who were employed after the Order 2012 came into force ('the second category'). SP1, for the first category, led the complaint against the defendant, claiming for his unpaid basic salary for 22 months for the amount of RM900 monthly. The plaintiffs claimed that they were paid RM350 as basic wages prior to the commencement of Order 2012 and the plaintiffs denied that the defendant negotiated with the plaintiffs for the wages to be restructured. The plaintiffs also claimed that after the commencement of Order 2012, the defendant failed to pay the minimum wages of RM900 as provided in Order 2012. The defendant, on the other, hand, claimed that the wages for the plaintiffs in the first category were paid as commission after the negotiation for salary restructure held between the parties. The defendant claimed that the first category was given RM350 as allowance but were recorded as basic wages until November 2012 and after the negotiation, their wages were restructured according to the contract of service from December 2012 onwards, where the RM350 was recorded as allowance and not paid basic wages as stated in their employment contract. The defendant claimed that in the case of the plaintiffs of the second category, they were paid in accordance with Order 2012 as they were employed after the commencement of the Order 2012 and they were never part of the negotiation or the restructuring as their wages were successfully restructured as of December 2012 in accordance with Order 2012. The defendant claimed that after the Order 2012 was gazetted, the first category plaintiffs were

subjected to a mutual discussion during the monthly operations meeting where the first category plaintiffs were given an option to receive the minimum basic wages of RM900 and the 15% commission reduced by 2% accordingly or maintain *status quo* by reverting to being paid no basic wages as stated in their contract of service and maintain the commission at 15%. The defendant claimed that the first category plaintiffs unanimously wanted the *status quo* to be maintained as they were of the opinion that the value of the 2% of the commission proposed to be reduced was higher than the RM550 top up to the RM350 to attain the RM900 minimum wage and they had agreed to maintain the *status quo*. The Director General ('DG'), in allowing the plaintiffs' claim, decided that the plaintiffs were not paid the minimum wage by the defendant as provided under s. 23 of the National Wages Consultative Council Act 2011 ('NWCCA 2011'). Dissatisfied with the DG's decision, the defendant appealed. The crux of the matter was whether the plaintiffs were entitled to the unpaid minimum wages.

Held (dismissing appeal with costs):

(1) Order 2012 clearly states that 'the minimum wage rates payable to an employee shall be at RM900' which means it is mandatory to provide a minimum wage. Section 2 of NWCCA 2011 incorporating the word 'means' limits the definition of minimum wage as to what is expressly stated. As intended by Parliament, the minimum wage is to be fixed to allow for the EPF or SOCSO deductions and the allowance be given should be based on the basic salary of workers. Upon careful perusal of the salary slips of the plaintiffs, SP1's salary showed that for the month of December 2012, there was no basic rate nor basic pay. Based on O. 4 of Order 2012 and the definition of minimum wage under s. 2 of NWCCA, there were no basic wages for SP1. (paras 39-41)

(2) On the argument forwarded by the defendant that the plaintiffs were paid allowance and commission and therefore their salary would exceed the RM900, this court wished to disregard such argument as the salary slips had clearly detailed the monthly payment where the basic pay was initially at RM350 but later stated as nil and allowances were paid excluding the basic pay. The law is crystal clear that the Order 2012 minimum wage applied to basic salary which did not include the allowance and commission. (paras 42 & 43)

(3) The definition of wages is clearly defined separating the salary from commission and allowance under s. 2 of Employment Act 1955. It is also clearly provided under s. 24(2) of NWCCA 2011 that where the rate for the basic salary in the employment contract is lower than the rate for minimum wage as required under the minimum wage order, then such rate must be substituted with any rates that are no lesser than the rate of minimum wage. Furthermore, O. 6 of Order 2012 clearly spelled out that in negotiating for restructuring of wages, it is on the

restructured basic wages to be paid to the employee where it must be in accordance with the minimum wages specified in Order 2012. Therefore, the laws are clear that the basic wage differs from commission and allowance and there must be minimum wage provided to workers. Upon careful perusal of the contract of service, the employment terms were not in compliance with Order 2012 and it was the same terms of employment applied to the second category of plaintiffs. (paras 46-49)

(4) The inconsistency with the legal requirements under Order 2012 was further corroborated by the defendant's own admission that they did not conform to the minimum wage legal requirement as provided under Order 2012. Based on the facts and evidence adduced, the onus was on the plaintiff to prove that no basic salary was paid where initially the basic salary paid was RM350 and categorised as allowance which meant it was still below the minimum wage. The plaintiffs were then not paid with basic pay and the wages were derived from allowances. The plaintiffs had thus discharged the burden. (paras 51 & 53)

(5) No minimum wage of RM900 was paid to the plaintiffs and after the Order 2012 came into force, the basic wage of RM350 was abolished in the pretence of restructure. Upon clarification sought on the fact finding of no consensus by plaintiffs, there was no actual attendance and consensus recorded at the meeting save for the list of names of plaintiffs as adduced by the defendant. There was no proof to show that the plaintiffs had agreed to the change of basic wages to allowance. The DG had correctly made a finding of fact that the defendant unilaterally decided without the consensus of the plaintiffs. The DG had not erred on fact and law in deciding that the plaintiffs' basic salary was not paid according to O. 4 of Order 2012 and s. 23(1) and s. 24(2) of NWCCA 2011.The DG had evaluated all the plaintiffs' claims based on the documentary evidence produced before the labour court and referred to s. 101(1) and (2) of Evidence Act 1950 on the burden of proof principle, the relevant provisions of the NWCCA 2011, Employment Act 1955 and Order 2012. The defendant had failed to rebut the onus on evidence. (paras 54, 59, 60 & 61)

Case(s) referred to:

Agenda Wira Sdn Bhd v. Ahmad Zaidi Shamsuddin & Ors [2017] 1 LNS 1200 HC ***(refd)***

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2015] 1 LNS 1450 HC ***(refd)***

Electrical Industry Worker's Union v. OYL Manufacturing Company Sdn Bhd [2015] 4 ILR 71 ***(refd)***

Federal Hotel Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Low Seng Suan v. New Subang Transport Sdn Bhd [2008] 1 ILR 520 ***(refd)***
Mohd Faizal Md Sari & Satu Lagi lwn. Touch Mobileguards Sdn Bhd [2016] 1 ILR 259 ***(refd)***
Muir Mills Co Ltd v. Its Workmen 1960 SCR (3) 488 ***(refd)***
National Union Of Employee In Companies Manufacturing Rubber Products v. Ansel Companies Operating In Melaka (Ansell Malaysia Sdn Bhd/Ansel Medical Sdn Bhd/ Ansell NP Sdn Bhd) [2014] 4 ILR 381 ***(refd)***
National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia v. The Plaza Hotel Kuala Lumpur [2015] 1 ILR 443 ***(refd)***
Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor [2004] 3 CLJ 321 CA ***(refd)***
Pepper v. Hart [1993] AC 593 ***(refd)***

Legislation referred to:
Employment Act 1955, ss. 2(1), 77, First Schedule para 3
Evidence Act 1950, s. 101(1), (2)
Interpretation Acts 1948 and 1967, ss. 17A, 20
Minimum Wages Order 2012, O. 3, O. 4, O. 6(a)
National Wages Consultative Council Act 2011, ss. 2, 4(2), 23(1), 24(2)
Rules of Court 2012, O. 55

Other source(s) referred to:
Anand Krishnan, *Words, Phrases 86 Maxims, Legally & Judicially Defined*, Vol 2A (II), B p 575

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For the respondents - M Eswary; M/s The Law Firm of M Eswary

Reported by Suhainah Wahiduddin

JUDGMENT

Zalita Zaidan JC:

Introduction

[1] This is an appeal by the appellant (defendant) against the Assistant Director General, representing the Director General (DG), of the Labour Court's decision granted on 14 June 2016 which allowed the respondents' (plaintiffs) claim against the appellant under the Minimum Wages Order 2012 (Order 2012).

[2] The appeal case BA-16-23-06-2016 was heard together with case Civil Appeal No: BA-16-24-06-2016 (case no: 24) and Civil Appeal No: BA-16-26-06-2016 (case no: 26) on 2 March 2018 where I pronounced my decision. In this instant appeal, 20 complainants took the complaint against the appellant who is the employer of the respondents (pp. 4-5 of plaintiffs' counsel's written submission and pp. 1-301 of record of appeal Jilid 1/6). The respondents were led by Encik Masri bin Halim who is the named leading party and as witness SP1.

[3] The parties, in this judgment, will be known as they were in the Labour Court, the appellant will be referred to as 'the defendant' and the respondents will be addressed collectively as 'the plaintiffs'. The appeal for case BA-16-23-06-2016 is dismissed with costs and binds the two other appeals. My full written ground follows.

Brief Facts

[4] The dispute before this court involves the plaintiffs who claimed that they were not being paid the minimum wages of RM900 for the period ranging from January 2013 to November 2014.

[5] The plaintiffs are the employees of the defendant as lorry drivers. There are two categories of plaintiffs who lodged complaints against the defendant that is, the plaintiffs who were employed before 1 January 2013, which is prior to the date of commencement of the Order 2012 ("the first category") (pp. 4-5 of plaintiffs' counsel's written submission, pp. 1-301 of the record of appeal jilid 1/6 of file case no. 23) for the minimum wages from January 2013 to October 2014 (for case no: 23 and case no: 24) and the plaintiffs who were employed after the Order 2012 came into force (case no: 26) ("the second category").

[6] Before the DG, the complaint (case no: 23) was heard with similar complaints led by one Mohd Siswandi bin Shapain and 18 others (Civil Appeal No: 16-24-06-2016) (case no: 24) and one Rohaizan bin Othman and 17 others (Civil Appeal No: 16-26-06-2016) (case no: 26) where altogether there were 57 complainants against the defendant. The DG's overall decision for the 57 complainants are as reflected in her written ground of judgment dated 14 June 2016 (pp. 281-306 of the supplementary record of appeal of bundle case no: 23, pp. 293-318 of supplementary record of appeal of bundle case no: 24 and pp. 281-306 of supplementary record of appeal of bundle case no: 26).

[7] The plaintiffs were appointed as lorry drivers pursuant to the contract of service (p. 171 of the appeal record). SP1, for the first category led the complaint against the defendant, claimed for his unpaid basic salary for 22 months, from January 2013 until October 2014 for the amount of RM900 monthly where the total amount claimed by SP1 alone is RM19,800 (p. 15 of the record of appeal jilid 1/6 bundle case no: 23).

[8] The plaintiffs claimed that they were paid RM350 as basic wages prior to the commencement of Order 2012 and the plaintiffs denied that the defendant negotiated with the plaintiffs for the wages to be restructured. The plaintiffs also claimed that after the commencement of Order 2012, the defendant failed to pay the minimum wages of RM900 as provided in the Order 2012.

[9] The plaintiffs claimed for RM309,600, RM297,000 for case no: 24 and RM287,100 for case no: 26 (pp. 4-7 of plaintiffs' counsel's written submission).

[10] The defendant on the other hand claimed that the wages for the plaintiffs in the first category are paid as commission after the negotiation for salary restructure held between the parties. The defendant claimed that the first category was given RM350 as allowance but were recorded as basic wages until November 2012 and after the negotiation, their wages were restructured according to the contract of service from December 2012 onwards, where the RM350 was recorded as allowance and not paid basic wages as stated in their employment contract (para. 2.5, p. 5 of defendant's counsel's written submission).

[11] The defendant claimed that in the case of the plaintiffs of the second category, they were paid in accordance with the Order 2012 as they were employed after the commencement of the Order 2012 and they were never part of the negotiation or the restructuring as their wages were successfully restructured as of December 2012 in accordance with Order 2012 (para. 2.6, p. 5 of defendant's counsel's written submission).

[12] The defendant claimed that after the Order 2012 was gazetted, the first category plaintiffs were subjected to a mutual discussion during the monthly operations meeting where the first category plaintiffs were given an option to receive the minimum basic wages of RM900 and the 15% commission reduced by 2% accordingly or maintain *status quo* by reverting to being paid no basic wages as stated in their contract of service and maintain the commission at 15%. The defendant claimed that the first category plaintiffs unanimously wanted the *status quo* to be maintained as they were of the opinion that the value of the 2% of the commission proposed to be reduced is higher than the RM550 top up to the RM350 to attain the RM900 minimum wage and they have agreed to maintain the *status quo*.

[13] The DG's decision is at pp. 281-306 of the supplementary record of appeal (in bundle Civil Appeal No: 16-23-06-2016) which allowed the plaintiffs' claim and decided that the plaintiffs were not paid the minimum wage by the defendant as provided under s. 23 of the National Wages Consultative Council Act 2011 (also known as Akta Majlis Perundingan Gaji Negara 2011) (NWCCA 2011) and pursuant to O. 4 of Order 2012.

[14] The defendant appealed on the DG's decision hence this appeal therein.

Defendant's Submission

[15] The learned counsel for the defendant advanced several grounds for this appeal, altogether are eight grounds as in the defendant's counsel's written submission based on the amended memorandum of appeal (pp. 1-4 of the additional appeal record). It is submitted that the main ground of appeal is the minimum wage dispute.

[16] The defendant's counsel submitted that the DG had erred in finding that there was no basic wages of RM900 paid to the plaintiffs and that the commission does not form part of the minimum wages but on the other hand, the DG had accepted the fact that the plaintiffs were paid in excess of RM900 per month. The defendant's counsel submitted that the commission is stipulated at para. 5 of the contract of service (p. 176 of the record of appeal jilid 1/6) and the total wages are derived from the RM350 fixed allowance and commission gained from the deliveries and pick-ups which exceeds RM900.

[17] It was further averred by the defendant's counsel that there is no element of basic wages and invited this court to apply the "purposive approach" to s. 2 of Employment Act 1955 (Act 265) on the definition of basic wages.

[18] The defendant's counsel also submitted that the DG was in ignorance of the implementation guideline as the instrument of guidance prior to the implementation of the Order 2012 and the minimum wages Order No. 4 of 2016 which revoked the Order 2012. Section 2(1) of the Employment Act 1955 and para. 3 of First Schedule of Employment Act 1955 were referred as the defendant's counsel contended that the DG misguided herself with regards to the definition of wages.

[19] It is the contention of the defendant's counsel that the commission is included in the wages as per para. 3 of First Schedule of Employment Act 1955 and cited the authorities of *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor* [2004] 3 CLJ 321 and the case of *Low Seng Suan v. New Subang Transport Sdn Bhd* [2008] 1 ILR 520. The defendant's counsel also relied heavily on the Indian Supreme Court case of *Muir Mills Co Ltd v. Its Workmen* 1960 SCR (3) 488 which explained that the concept of wages includes the additional emoluments.

[20] The defendant's counsel pointed out that the plaintiffs in the first category were in agreement with the salary restructure as per the minutes of meeting (pp. 1541-1554 of the record of appeal jilid 6/6), whereas the plaintiffs in the second category were paid in accordance with the Order 2012 as reflected in their salary slips (pp. 172-301 of the record of appeal jilid 1/6) and averred that the plaintiffs' claims are unsustainable.

Plaintiffs' Submission

[21] In replying to the points of appeal as raised by the defendant's counsel, learned counsel for the plaintiffs relied heavily on the case of *Agenda Wira Sdn Bhd v. Ahmad Zaidi Shamsuddin & Ors* [2017] 1 LNS 1200 which was upheld by the Court of Appeal on 27 February 2018. The plaintiffs' counsel submitted that 'wages' as defined under s. 2 of Employment Act 1955 consists of two components that is basic wages and other payments. The

plaintiffs' counsel strongly argued that the commission basically falls under 'other payments' that was not applied by the defendant in the present case (para. 5 of the contract of service, p. 176 of record of appeal).

[22] The plaintiffs' counsel averred that the argument put forward by the defendant that the plaintiffs were not paid basic wages but the overall wages exceeds RM900, is unsustainable. The plaintiffs' counsel submitted that such argument by the defendant's counsel is not in line with s. 23 of the National Wages Consultative Council Act 2011 (NWCCA 2011). In relation to the Garis Panduan Majlis Perundingan Gaji Negara - Kaedah Perlaksanaan Perintah Gaji Minima 2012, relied on the authorities, the case of *Mohd Faizal Md Sari & Satu Lagi lwn. Touch Mobileguards Sdn Bhd* [2016] 1 ILR 259 and the case of *Agenda Wira Sdn Bhd (supra)*.

[23] The counsel submitted that the defendant is subjected to the Order 2012 and relied on the High Court case of *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2015] 1 LNS 1450 that was upheld by the Court of Appeal (sealed order of the Court of Appeal in Civil No. W-02(A)-1601-09-2015) of 31 July 2017 (pp. 29-30 of plaintiffs' additional bundle of authorities), where it was held that the guideline has no legislative effect and is therefore not binding.

[24] The counsel for the plaintiffs also submitted that basic wages is guaranteed but the commission is paid accordingly which is not guaranteed and not subject to the definition of 'wages' following s. 2(1) of Employment Act 1955 and also relied on the case of *Federal Hotel Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150; [1983] 1 MLJ 175.

[25] On the issue of the plaintiffs in the first category that there was an agreement of salary restructure as per the minutes of meeting, it is the submission of the plaintiffs' counsel that the DG had made a finding of fact that the defendant had unilaterally decided the matter as there was only a list of attendance without consensus recorded among the plaintiffs.

[26] It was brought to this court's attention by the plaintiffs' counsel that for the contract of service of SP1 dated 5 December 2011 (p. 175 of record of appeal), it is stated, 'pendapatan kepada pemandu akan dikira mengikut komisyen daripada sewaan lori kepada pelanggan dengan kadar peratusan yang telah ditetapkan oleh syarikat dan ia bergantung kepada pendapatan sewaan loni sepenuhnya' and the salary slip at p. 171 of the record of appeal, dated 31 October 2012 stated that the basic pay as RM350 and allowance/ commission as RM2651.31, where the basic pay is still below the minimum wage of RM900 and averred that the defendant did not follow the Order 2012.

A **Labour Court's Decision**

[27] The DG's decision as reflected had stated briefly that the Labour Court finds that the defendant did not adhere to Order 2012, an extraction of the judgment is reproduced for ease of reference (pp. 293-317 of supplementary record of appeal case no: 24):

B

> Kesimpulan
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> Mahkamah berpendapat bahawa Pihak Kena Tuntut tidak melaksanakan Perintah Gaji Minimum 2012 di mana tiada gaji pokok dibayar sepertimana takrifan gaji minimum itu atau sebagaimana yang ditetapkan di bawah Seksyen 23.
>
> C
>
> Dengan itu, Mahkamah mendapati Pihak Kena Tuntut telah tidak membuat pembayaran gaji minimum iaitu gaji pokok RM900.00 seperti yang diperuntukkan di bawah Perintah 4 di dalam Perintah Gaji Minimum 2012 iaitu kadar gaji minimum yang kena dibayar kepada seseorang pekerja adalah seperti berikut: Kawasan Wilayah Semenanjung Malaysia
>
> D
>
> setiap bulan RM900.00 dan Seksyen 24(2) Akta Majlis Perundingan Gaji Negara 2011 menyatakan:
>
> > Jika kadar gaji yang dipersetujui dalam kontrak perkhidmatan adalah lebih rendah daripada kadar gaji minimum sebagaimana yang dinyatakan dalam Perintah Gaji Minimum, kadar itu
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> E
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> > hendaklah digantikan dengan apa-apa kadar yang tidak lebih rendah daripada kadar gaji minimum sebagaimana yang dinyatakan dalam Perintah Gaji Minimum itu.

The Court's Finding

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[28] This is an appeal against the decision of the DG which is an appeal from the subordinate court to the High Court following s. 77 of the Employment Act 1955 and O. 55 of the Rules of Court 2012.

[29] The defendant's counsel advanced eight grounds based on the amended memorandum of appeal dated 16 August 2017 (pp. 1-4 of the additional appeal record), the crux of the matter is whether the plaintiffs are entitled for

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the unpaid minimum wages, as claimed by the plaintiffs. It was the defendant's contention that the plaintiffs are not entitled to the minimum wage.

Minimum Wage

H

[30] Briefly, I will start with the approach taken on the complaint with reference to s. 101(1) and (2) of the Evidence Act 1950 that is whether the plaintiffs are entitled to claim for the nonpayment of basic salary. It must be proven that the plaintiffs are qualified to claim under the Employment Act 1955 as the party who is bringing the complaint against the defendant. Based

I

on the statements made by the defendant, the plaintiffs' witnesses and the documentary evidence adduced, the plaintiffs (altogether 57 employees) fall under the category of employee as defined under s. 2(1) First Schedule of the Employment Act 1955.

[31] Based on the facts submitted before me, there was no dispute that prior to the commencement of Order 2012, the plaintiffs were paid with basic wages of RM350 that were categorised as allowances. It is not disputed that the salary slips of the plaintiffs were printed by the defendant, as exhibited before the Labour Court. The dispute focused on the word 'basic salary' in the salary slips from January 2013 until October 2014 of the plaintiffs (pp. 171-321 of the record of appeal jilid 1/6 bundle case no: 23) and for SP1, at pp. 171-191 of the record of appeal jilid 1/6.

[32] The concept of minimum wage is defined under the NWCCA 2011. The preamble of the NWCCA 2011 stated that:

> An Act to establish a National Wages Consultative Council with the responsibility to conduct studies on all matters concerning minimum wages and to make recommendation to the Government to make minimum wages orders according to sectors, types of employment and regional areas, and to provide for related matters.

[33] Section 17A of the Interpretation Acts 1948 and 1967 embodies the concept of purposive approach as explained in the House of Lords in *Pepper v. Hart* [1993] AC 593 to see the construction that would promote the purpose or object underlying a particular Act where Lord Griffiths observed that:

> ... The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry ...

[34] This court finds that in interpreting the provisions relating to the statutory functions and powers, the purposive approach need not be relied upon. However, in ascertaining the intention of the Parliament, reference can be made to the Hansard as decided in the *Pepper v. Hart (supra)* case where during the tabling of the National Wage Consultative Council Bill 2011 on 30 June 2011, the Minister in charge of human resources stated that:

> Tuan Yang di-Pertua, pada masa ini penetapan gaji bagi pekerja-pekerja sektor swasta di Malaysia, ditentukan melalui tiga kaedah iaitu:
>
> (i) kuasa-kuasa pasaran berdasarkan penawaran dan permintaan dalam pasaran buruh;
>
> (ii) melalui perjanjian kolektif ataupun collective agreement hasil rundingan antara kesatuan sekerja dengan pihak majikan; dan
>
> (iii) melalui Majlis Penetapan Gaji di bawah Akta Majlis Penetapan Gaji 1947.
>
> Daripada ketiga-tiga kaedah tersebut, hanya gaji yang ditetapkan melalui Majlis Penetapan Gaji merupakan gaji minimum.
>
> Gaji minimum juga bertujuan mengelakkan eksploitasi majikan ke atas pekerja dalam keadaan majikan mudah mendapat bekalan pekerja asing yang sanggup menerima gaji yang rendah. Selain itu, ia bertujuan untuk

mengoptimumkan penggunaan tenaga kerja tempatan dan bagi menggalakkan majikan meningkatkan rantaian nilai melalui pelaburan dalam teknologi tinggi dan peningkatan produktiviti pekerja. Dengan itu, secara tidak langsung, dapat mengurangkan kebergantungan kepada pekerja asing.

Dalam fasal 2 rang undang-undang ini, gaji minimum ertinya gaji pokok yang diwartakan dalam perintah gaji minimum. Rasional gaji pokok dipilih sebagai gaji minimum adalah bagi mengelakkan pelaksanaan gaji minimum ini dimanipulasikan kaedah pembayarannya kepada pekerja. Selain itu, secara umumnya pembayaran elaun atau pemberian faedah penggajian oleh majikan adalah berdasarkan kepada gaji pokok seseorang. Oleh itu sebarang pemberian elaun seperti elaun lebih masa yang diasaskan kepada gaji pokok akan dapat meningkatkan pendapatan keseluruhan seseorang pekerja. Gaji pokok juga akan dapat memastikan seseorang pekerja dapat menerima caruman KWSP atau PERKESO yang lebih tinggi dan ini akan dapat menjamin masa depan pekerja dan keluarganya. Dengan kata lain, gaji minimum juga bertujuan meningkatkan perlindungan sosial kepada pekerja bukan sahaja semasa mereka bekerja tetapi juga untuk hari tua.

[35] In fact the rational for enacting the minimum wage legislation was deliberated in the case of *Electrical Industry Worker's Union v. OYL Manufacturing Company Sdn Bhd* [2015] 4 ILR 71 which was also referred to in the case of *Mohd Faizal Md Sari (supra)* where the Industrial Court held that:

> [46] The rationale for introducing the minimum wages was explained by The Honourable Datuk Dr. S. Subramaniam, Minister of Human Resources who tabled the bill at the Dewan Rakyat (House of Representatives). During the second and third reading of the Bill on 30 June 2011, it was reported in Penyata Rasmi Dewan Rakyat (The Hansard)' in its original language at pp. 35 and 36 as follows:
>
> > Datuk Dr S Subramaniam: Tuan Yang di-Pertua dan Ahli-Ahli Yang Berhormat sekalian, Kerajaan telah menetapkan sasaran untuk mencapai status negara berpendapatan tinggi menjelang tahun 2020 melalui empat tunggak utama transformasi iaitu Model Baru Ekonomi, Program Tranformasi Kerajaan, Program Transformasi Ekonomi dan Rancangan Malaysia Kesepuluh.
> >
> > ...
> >
> > Gaji yang ditentukan melalui kuasa pasaran didapati tidak berkesan kerana berdasarkan kajian oleh Bank Dunia sejak sepuluh tahun yang lepas, kadar gaji di Malaysia hanya meningkat secara purata sebanyak 2.6 peratus setahun. Kajian Guna Tenaga Kebangsaan yang akan dilaksanakan oleh Kementerian Sumber Manusia pada tahun 2009, melibatkan sampel sebanyak 24,000 majikan dan 1.3 juta pekerja mendapati 33.8 peratus perkerja adalah bergaji di bawah RM 700 sebulan. Ini menunjukkan bahawa

> terdapat herotan dalam pasaran buruh yang many kadar gaji yang ditentukan oleh kuasa pasaran telah mengekang peningkatan kadar gaji sedangkan kos sara hidup meningkat berlipat kali ganda.
>
> ...
>
> Tuan Yang di-Pertua, pelaksanaan gaji minimum bertujuan untuk membantu golongan berpendapatan rendah meningkatkan kuasa beli bagi menghadapi peningkatan kos ...

[36] The NWCCA 2011 replaced the Wages Councils Act 1947: *Electrical Industry Workers' Union v. OYL Manufacturing Company Sdn Bhd* [2015] 4 ILR 71 at p. 80; *Mohd Faizal Md Sari (supra)* case, at p. 266. Based on s. 2 of the NWCCA 2011, "wages" is defined as:

> has the same meaning assigned to it in s. 2 of the Employment Act 1955 [Act 265], s. 2 of the Sabah Labour Ordinance [Cap. 67] or s. 2 of the Sarawak Labour Ordinance [Cap. 76]
>
> whereas "minimum wages" means, "the basic wages to be or as determined under section 23;"
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> Section 2 of Employment Act 1955 defines 'wages' as,
>
> "means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include:
>
> (a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;
>
> (b) any contribution paid by the employer on his own account to any pension fund ...;
>
> (c) any travelling allowance or the value of any travelling concession;
>
> (d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;
>
> (e) any gratuity payable on discharge or retirement; or
>
> (f) any annual bonus or any part of annual bonus:"

[37] Section 23 of the NWCCA 2011 stated that,

> Minimum wages order
>
> 23. (1) Where the Government agrees with the recommendation of the Council under paragraph 22(2)(a) or 22(4)(a) or determines the matters under paragraph 22(4)(b), the Minister shall, by notification in the *Gazette*, make a minimum wages order on the matters specified in paragraphs 22(1)(a) to (e) as agreed to or determined by the Government.

By virtue of s. 23 of NWCCA 2011, the Government may agree on the Council's recommendation or the Government determines on the minimum wage and gazette the Order for public knowledge.

[38] The Order 2012 (P.U. (A) 214/2012) pursuant to s. 23(1) of the NWCCA 2011 came into force on 1 January 2013 provides for the rate for the minimum wage under O. 4, which stated as follows:

The minimum wage rates payable to an employee shall be as follows:

Kawasan wilayah	Kadar gaji minimum	
	Bulanan	Setiap jam
Semenanjung Malaysia	RM900	RM4.33
Sabah, Sarawak dan Wilayah Persekutuan Labuan	RM800	RM3.85

[39] Therefore Order 2012 clearly stated that "the minimum wage rates payable to an employee "shall ..." be at "RM900" which means it is mandatory to provide minimum wage. In addition, based on O. 3 of Order 2012, it expressly prohibits the application of minimum wage to the categories mentioned which is not applicable on the plaintiffs in this case.

[40] It was submitted to this court by the defendant's counsel that this court must adopt the purposive approach on the wages definition, under s. 2 of Employment Act 1955 to which this court sought clarification whether there are authorities in support of applying purposive approach on definitions. However, the counsel for the defendant could not submit any authorities. This court viewed that the definition of minimum wages under s. 2 of NWCCA 2011 incorporating the word "means", limits the definition of minimum wage as to what is expressly stated: *National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia v. The Plaza Hotel Kuala Lumpur* [2015] 1 ILR 443. As intended by Parliament, the minimum wage is to be fixed to allow for the EPF or SOCSO deductions and the allowance be given should be based on the basic salary of workers.

[41] Upon careful perusal of the salary slips of the plaintiffs, this court finds that for instance SP1's salary slip provides the particulars of the payment and at p. 172 dated 31 October 2012, it consists of 'Basic Rate', 'Working Days', 'Basic Pay' Director Fee', 'Overtime', 'Allowance', 'Gross Pay', 'Deduction', 'EPF' 'SOCSO', 'Tax' and 'Net Pay'. The basic pay stated for 31 October 2012 is stated as RM350. For the month of December 2012, there was no basic rate nor basic pay and the wages under the allowance column was 3861.66. There were deductions for of EPF, SOCSO and tax of 1060 where SP1 is left with RM1,616.31. This court is of the view that based on O. 4 of Order 2012 and the definition of minimum wage under s. 2 of NWCCA 2011, there was no basic wages for SP1.

[42] On the argument forwarded by the defendant that the plaintiffs were paid allowance and commission and therefore their salary would exceed the RM900, this court wishes to disregard such argument as the salary slips had clearly detailed the monthly payment where the basic pay is initially at

RM350 but later stated as nil and allowances are paid excluding the basic pay. This court wishes to refer to the authority on the difference between 'basic salary' and 'allowance' as decided in the case of *National Union of Employee in Companies Manufacturing Rubber Products v. Ansel Companies Operating in Melaka (AnseII Malaysia Sdn Bhd/ Ansel Medical Sdn Bhd/Ansel Np Sdn Bhd)* [2014] 4 ILR 381 which explained in reference to '*Words, Phrases 86 Maxims, Legally & Judicially Defined*, Volume 2 A (II), B by Anand Krishnan at p. 575,

> ... basic wage never includes the additional emoluments which some workman may earth [earn] ...

[43] The law is crystal clear that the Order 2012 minimum wage applies to basic salary which does not include the allowance and commission. This is in considering the case law attributed by the plaintiffs' counsel, the case of *Mohd Faizal v. Touch Mobileguards* [2016] 1 ILR 259 where the High Court of Malacca read s. 23 of the NWCCA 2011 together with s. 2 of the Employment Act 1955 on the definition of salary and revoked the Director General's decision on his finding that the Order 2012 is in relation to basic salary that includes allowance and commission.

[44] In the *National Union [2014] (supra)* case which was also referred in the case of *Mohd Faizal Md Sari (supra)* held that 'basic salary' does not include the monetary allowances:

> On the stoppage of the meal allowances for the affected workmen when their basic wages had been increased pursuant to the Minimum Wages Order 2012, the term "basic wages" did not include monetary allowances. When the minimum wages of RM900 had been implemented in Peninsular Malaysia on January 2013 pursuant to the said order, the basic wages that had become payable was RM900 per month.

[45] There had been a number of authorities decided setting the benchmark on basic wage which does not include allowances or commission. In one of my recent judgments, I decided in the case of *Agenda Wira Sdn Bhd (supra)* in 2017 which had been upheld by the Court of Appeal that the new salary based on attendance does not come under the category of 'basic salary'.

[46] I viewed the laws are clear on defining basic wage. The definition of wages is clearly defined separating the salary from commission and allowance under s. 2 of Employment Act 1955. It is also clearly provided under s. 24(2) of NWCCA 2011 that where the rate for the basic salary in the employment contract is lower than the rate for minimum wage as required under the minimum wage order, then such rate must be substituted with any rates that are no lesser than the rate of minimum wage.

[47] Furthermore, O. 6 of Order 2012 clearly spelled out that in negotiating for restructuring of wages, it is on the restructured basic wages to be paid to the employee where it must be in accordance with the minimum

wages rates specified in Order 2012. Therefore, the laws are clear that the basic wage differs from commission and allowance and there must be minimum wage provided to workers.

[48] Reverting to the contract of service of SP1 dated 5 December 2011 as stated at p. 175 of the record of appeal jilid 1/6, there was no mention of basic salary and only stated at para. 5 of the employment terms, *inter alia*:

> Pendapatan kepada pemandu akan dikira mengikut komisyen daripada sewaan lori kepada pelanggan dengan kadar peratusan yang telah ditetapkan oleh syarikat dan ia bergantung kepada pendapatan sewaan lori sepenuhnya.

Evidently, no basic salary is recorded in the salary slips and the services rendered by the plaintiffs are based on commission, stated under the "Allowances' column.

[49] Paragraph 5 of the terms also states:

> Komisyen yang diberi kepada pemandu akan diubah oleh pihak syarikat dari semasa ke semasa mengikut kiraan jangkamasa perkhidmatan sama ada dengan memberi notis bertulis terlebih dahulu atau pun jika difikirkan perlu oleh pihak pengurusan.

Upon careful perusal of the contract of service, the employment terms were not in compliance with Order 2012 and it is the same terms of employment applied for the second category plaintiffs.

[50] The guideline 'Garis Panduan Majlis Perundingan Gaji Negara Mengenai Kaedah Pelaksanaan Perintah Gaji Minimum 2012' based on s. 4(2) of NWCCA 2011 is a guideline for employers to make the allowance payment as part of minimum wages and was only a guideline before the enforcement of Order 2012 on 1 January 2013, where there is a grace period for employers to negotiate with employees in accordance with O. 6(a) of Order 2012:

> Gaji pokok yang distruktur semula ... hendaklah mengikut kadar gaji minima yang kena ditetapkan dalam Perintah ini.

[51] The inconsistency with the legal requirements under Order 2012 is further corroborated by the defendant's own admission that they did not conform to the minimum wage legal requirement as provided under Order 2012. This court finds in addition to the statement recorded by the DG, the statement at pp. 287-288 of the additional record of appeal (file for case 16-23-06-2016), it was revealed that:

Soalan:	Wakil Pekerja ada bangkitkan tentang pemandu setuju dalam minit. Bagaimana persetujuan diperoleh?
Jawapan:	Angkat tangan ketika mesyuarat.

Soalan 53: Saya cadangkan juga bahawa kesemua minit Defendan sediakan, tidak boleh diterima pakai sebagai bukti menunjukkan bahawa pemandu pemandu memberikan persetujuan dan kebenaran bagi defendan membuat penstrukturan gaji mulai Disember 2012.

Jawapan: Tak setuju.

Soalan 54: Jika tidak setuju, boleh buktikan mana-mana di dalam minit, tercatat nama-nama pemandu yang bersetuju dalam penstrukturan gaji yang dibuat dan menurunkan tandatangan setuju?

Jawapan: Tapi tiada rungutan daripada pemandu.

Soalan 55: Saya cadangkan bahawa defendan tidak mengeluarkan surat makluman mengenai pertukaran gaji pokok kepada elaun untuk diberikan kepada pemandu-pemandu?

Jawapan: Tidak.

[52] The defendant testified its disagreement that the basic salary was not paid as it was reconstructed only (pp. 289 of the supplementary record of appeal):

> Saya tidak setuju RM350.00 tak dibayar sebabnya ianya tidak dibatalkan. Ianya distruktur semula.

[53] Therefore, based on the facts and evidence adduced, the onus is on the plaintiffs to prove that no basic salary was paid where initially the basic salary paid was RM350 and categorised as allowance which means it is still below the minimum wage. The plaintiffs were then not paid with basic pay and the wages are derived from allowances. Following s. 101 of the Evidence Act 1950 and the principle of burden of proof as enunciated in the Federal Court's case of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697, the plaintiffs had discharged the burden and the onus shifts to the defendant to rebut by evidence.

[54] It is a glaring fact that no minimum wage of RM900 was paid to the plaintiffs and after the Order 2012 came into force, the basic wage of RM350 was abolished in the pretense of restructure. Upon clarification sought on the fact finding of no consensus by plaintiffs, it was brought to this court's attention that there was no actual attendance and consensus recorded at the meeting save for the list of names of plaintiffs as adduced by the defendant. This court also finds support based on the defendant's witness statement of SD5 (p. 165 of record of appeal jilid 1/6) whom stated that all the plaintiffs had agreed that the basic pay of RM350 be changed to allowance where tested against the documentary evidence, no proof to show that the plaintiffs agreed to the change of basic wages to allowance. The DG had correctly made a finding of fact that the defendant unilaterally decided without the consensus of the plaintiffs.

[55] This court wishes to highlight some of the discrepancies in the evidence against the defendant where an employee, one Hamzah bin Yusop of the first category was hired on 30 June 2011 (p. 427 of record of appeal jilid 2/6), however the letter of employment was only given on 30 July 2013 (p. 430 of record of appeal jilid 2/6) with the same terms of employment of the first category. In another employee case, one Anwar bin Marsidek, the letter to hire was dated 13 January 2012 where the employee is to be hired officially on 9 January 2012 (p. 614 of record of appeal jilid 3/6) but the letter incorporating the terms of employment signed was dated 8 May 2013 (p. 617 of record of appeal jilid 3/6) which is after the commencement of Order 2012. The salary as per the terms are stated under para. 5, which is based on commission (p. 615 of record of appeal jilid 3/6) where the wages earned for 31 December 2014 under column 'allowance' was RM2,757 and after deductions of EPF and SOCSO, the total salary left is RM897 (p. 618 of record of appeal jilid 3/6). The same terms of employment were applied without adhering to Order 2012.

[56] This court also finds that the salary slip dated 31 December 2014 of Hamzah bin Yusop stated the basic pay as '0.00' and the wages under the 'allowance' column as '5034.04' where the deductions for EPF (561), SOCSO (14.75) and tax (604.05) were made, leaving with the balance of RM3091.49. This court observed that based on the salary slips of the plaintiffs, the "wages" is made of allowances where the total collected would exceed the tax exemption amount and therefore the employee is made to pay the tax.

[57] The NWCCA 2011 and Order 2012 reflected the intention of Parliament to provide the minimum wage to avoid exploitation of workers by employers where they are based on the demand and supply of the labour market. The objective as announced in the Hansard, among others, was to avoid the manipulation of payment of wages where employers tend to have the upper hand of hiring cheaper foreign workers. This court viewed that arranging payment of wages based on allowance or commission is circumventing the NWCCA 2011 and Order 2012.

[58] It is also not for this court to ascertain by interpreting differently from the plain and unambiguous language of ss. 23(1) and 24(2) of NWCCA 2011 and O. 4 of Order 2012 which clearly provide the minimum wage for workers. This court also holds the view that the Minimum Wages Order No. 4 of 2016 as alluded by the defendant's counsel does not apply as the said Order No. 4 2016 does not operate retrospectively: s. 20 of the Interpretation Acts 1948 and 1967.

[59] I viewed that the DG had seen and heard the witnesses and had evaluated all the facts and evidence before the DG as reflected in its written judgment. I find that the DG had not erred on fact and law in deciding that the plaintiffs' basic salary was not paid according to O. 4 of Order 2012 and ss. 23(1) and 24(2) of NWCCA 2011.

[60] I viewed that the DG had evaluated all the plaintiffs' claims based on the documentary evidence produced before the Labour Court and referred to s. 101(1) and (2) of Evidence Act 1950 on the burden of proof principle, the relevant provisions of the NWCCA 2011, Employment Act 1955 and Order 2012 and relied on case laws in making her findings in allowing plaintiffs' claims (pp. 295-317 of supplementary record of appeal case no: 24).

[61] I viewed that the defendant had failed to rebut the onus on evidence and the burden to prove remained with the defendant. In view thereof, I have answered the main ground of appeal that goes straight to the root of the matter.

[62] In light of the above reasons, the appeal is dismissed with costs. This decision binds the appeal case no: 24 and appeal case no: 26. Accordingly, appeals for case no: 24 and case no: 26 are dismissed with costs.